

1 **FEDERAL ELECTION COMMISSION**  
2  
3 **FIRST GENERAL COUNSEL'S REPORT**  
4

5 MUR: 7264  
6 DATE COMPLAINT FILED: 7/11/2017  
7 DATE OF NOTIFICATION: 7/14/2017  
8 LAST RESPONSE RECEIVED: 8/24/2017  
9 DATE ACTIVATED: 11/2/2017

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11 ELECTION CYCLE: 2018  
12 EXPIRATION OF SOL: 12/15/2021 – 10/13/2022

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14 **COMPLAINANT:** American Democracy Legal Fund

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16 **RESPONDENTS:** Theodore "Todd" Rokita  
17 Hoosiers for Rokita and Michael J. Erler Sr.  
18 in his official capacity as treasurer  
19

20 **RELEVANT STATUTES** 52 U.S.C. § 30101(2)  
21 **AND REGULATIONS:** 52 U.S.C. § 30102(e)(1)  
22 52 U.S.C. § 30104(a), (b)  
23 11 C.F.R. § 100.3  
24 11 C.F.R. § 100.72  
25 11 C.F.R. § 100.131  
26 11 C.F.R. § 101.1(a)  
27 11 C.F.R. § 101.3  
28 11 C.F.R. § 110.8(d)  
29

30 **INTERNAL REPORTS CHECKED:** Disclosure Reports

31 **AGENCIES CHECKED:** None

32 **I. INTRODUCTION**

33 This matter involves allegations that Hoosiers for Rokita and Michael J. Erler Sr., in his  
34 official capacity as treasurer (the "Committee"), and Theodore "Todd" Rokita (collectively  
35 "Respondents"), violated the registration and reporting requirements of the Federal Election  
36 Campaign Act of 1971, as amended (the "Act") in connection with Rokita's testing-the-waters  
37 activities for his 2018 Senate campaign. The Complaint alleges that Rokita became a Senate

HOOSIERS FOR ROKITA

1 candidate in February 2017, but failed to file a Statement of Candidacy and otherwise comply  
2 with the Act's registration and reporting requirements at that time.

3 In a joint response filed by Rokita and the Committee, Respondents assert that Rokita  
4 was not a Senate candidate until August 9, 2017, when he officially announced his candidacy,  
5 and that Rokita timely filed his Statement of Candidacy for the Senate on August 15, 2017.<sup>1</sup>  
6 They also argue that as a sitting congressman, the testing-the-waters regulations do not apply to  
7 Rokita,<sup>2</sup> but that to the extent they do, Rokita's statements and activities were consistent with the  
8 regulations and any funds Rokita received or spent while he was considering a Senate run were  
9 timely disclosed by the Committee.<sup>3</sup>

10 The available information shows that the Committee was reporting receipts and  
11 disbursements for the 2018 election beginning in November 2016, but Rokita failed to file a  
12 Statement of Candidacy for *any* 2018 federal election until he filed his Statement of Candidacy  
13 for his House campaign in June 2017. Furthermore, Rokita appears to have been raising and  
14 spending funds to test the waters for a 2018 Senate campaign beginning in February 2017, and  
15 used the Committee (which was designated as the principal campaign committee for his House  
16 campaign) to conduct and report those exploratory activities. After receiving notification of the  
17 Complaint in July 2017, Rokita amended the Statement of Candidacy he had filed for the House  
18 race, to reflect that he was now running for Senate. Similarly, the Committee filed an amended  
19 Statement of Organization indicating it was now the principal campaign committee for Rokita's  
20 Senate candidacy.

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<sup>1</sup> See Resp. at 1 (Aug. 23, 2017).

<sup>2</sup> *Id.* at 1-2.

<sup>3</sup> *Id.* at 2-5.

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1 Under these circumstances, we recommend that the Commission find reason to believe  
2 that Rokita violated 52 U.S.C. § 30102(e)(1) by failing to timely file a Statement of Candidacy  
3 for his House candidacy and that the Committee violated 52 U.S.C. § 30104(b) and 11 C.F.R.  
4 §§ 100.72(a) and 100.131(a) by failing to properly report Rokita's testing-the-waters activities  
5 for his Senate campaign. We also recommend the Commission find reason to believe that Rokita  
6 violated 11 C.F.R. § 110.8(d) by failing to establish separate campaign organizations for his  
7 House candidacy and potential Senate candidacy. Because we have not identified any specific  
8 facts indicating that Rokita became a Senate candidate prior to his announcement in August  
9 2017, we recommend that the Commission find no reason to believe that Rokita failed to timely  
10 file a Statement of Candidacy for his Senate candidacy. Finally, we recommend that the  
11 Commission enter into pre-probable cause conciliation with Respondents.

12 **II. FACTS**

13 Todd Rokita represents Indiana's 4th Congressional District in the United States House  
14 of Representatives. He has served in this position since 2011. Hoosiers for Rokita, Inc., has  
15 been Rokita's principal campaign committee since that time. Michael J. Erler Sr. is the  
16 Committee's treasurer.<sup>4</sup>

17 The Committee's disclosure reports indicate that it spent \$5,000 by November 30, 2016,<sup>5</sup>  
18 for the 2018 election and raised \$5,000 by February 6, 2017,<sup>6</sup> but did not file any Statement of

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<sup>4</sup> See Hoosiers for Rokita (Rokita), Statement of Organization (last amended Aug. 14, 2017).

<sup>5</sup> See Hoosiers for Rokita 2016 Year-End Report (listing over \$5,000 in disbursements designated for the 2018 primary election on November 30, 2016).

<sup>6</sup> See Hoosiers for Rokita 2016 Post-General Report, 2016 Year-End Report, and 2017 April Quarterly Report. In its 2016 Year-End Report, the Committee reported \$1,315,564 cash on hand with no debts or obligations for which it could raise post-election funds.

1 Candidacy at that time. Rokita made public statements about a possible Senate campaign at least  
2 as early as February 2017. On February 5, 2017, Rokita's House campaign website featured a  
3 local news article with Rokita's thoughts about a Senate campaign. The article, titled, "Indiana's  
4 U.S. Senate Race Quickly Heats Up," features the subheading "Looking Ahead to the 2018  
5 Senate Race" and quotes Rokita making comments about the incumbent Senator up for re-  
6 election in 2018, Joe Donnelly:

7 "Sen. Donnelly needs to quickly decide if he is going to work with President  
8 Trump and Republicans to get the country back on track, or if he is going to  
9 continue obstructing efforts to make America great again." Rokita said in a  
10 statement to FOX 59. "If he decides to stand with Chuck Schumer and  
11 Washington liberals against Hoosiers, we will be able to choose a new  
12 conservative senator in 2018, and I will continue to evaluate the best role for me  
13 in that effort."<sup>7</sup>

14  
15 Also in February 2017, the Reports Analysis Division ("RAD") wrote a "Disavowal  
16 Letter" to Rokita to inform him that the Committee had accepted contributions and/or made  
17 expenditures in support of a 2018 candidacy in excess of \$5,000, thus meeting the definition of  
18 "candidate" under the Act, but he had not yet filed a Statement of Candidacy.<sup>8</sup> RAD instructed  
19 Rokita to either disavow his 2018 activity by notifying the Commission that he was not a  
20 candidate for election in 2018, or re-designate the Committee by filing a Statement of Candidacy  
21 for 2018.<sup>9</sup> Rokita did not respond to RAD's disavowal letter or file a Statement of Candidacy  
22 for either a House or Senate candidacy within the 35 days prescribed by RAD.

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<sup>7</sup> Compl. at 1 (July 11, 2017) (citing <http://www.toddrokita.com/posts/news/looking-ahead-2018-senate-race>). That page is no longer available, but we have located a cached version from the Way Back Machine. See Attach. 1.

<sup>8</sup> *Id.* at 1-2; *see also* Letter from Nataliya Ioffe to the Honorable Theodore Rokita (Feb. 6, 2017).

<sup>9</sup> Letter from Nataliya Ioffe, *supra* note 8.

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1 On April 15, 2017, the Committee filed its April Quarterly Report with the Commission,  
2 disclosing receipts and disbursements through March 31, 2017. The first page of the report  
3 designates these receipts and disbursements for Indiana 4<sup>th</sup> District House race,<sup>10</sup> though Rokita  
4 still had not filed a Statement of Candidacy for any 2018 election at that time.

5 On April 20, 2017, a local political magazine ran an interview with Rokita, in which he  
6 discussed the Senate election. In that article, Rokita characterized himself as “the best candidate  
7 against Joe Donnelly.”<sup>11</sup> He also touted his legislative accomplishments in the House and noted,  
8 “I want to be over in the Senate moving those legislative levers.”<sup>12</sup> He added that his ultimate  
9 decision to run involved “a bit of a balancing act depending on how some of the *fundraising* is  
10 going from different parts of the country,” and said, “[t]here are bylaws in place that with an  
11 announcement make me an immediate challenger. So no final decision has to be made. It won’t  
12 be long, we’re not going to drag it out. If we get in, we’re in it to win.”<sup>13</sup>

13 Additionally, a May 9, 2017, news article discusses Rokita’s fundraising for his  
14 “expected” Senate candidacy. The article quotes Rokita’s newly-hired finance chair stating that  
15 Rokita raised over \$1.5 million for his anticipated Senate candidacy, and that Rokita “is putting

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<sup>10</sup> See Hoosier for Rokita April 2017 Quarterly Report at 1.

<sup>11</sup> Compl. at 2 (citing Brian H. Howey, *Rokita makes his case for GOP Senate*, HOWEY POLITICS INDIANA (April 20, 2017), <https://howeypolitics.com/Files/HPI170420.pdf>).

<sup>12</sup> Howey, *supra* note 11, at 3.

<sup>13</sup> *Id.* (emphasis added).

1 together the finance team needed, if he decides to enter the Senate race, to win the Republican  
2 nomination and defeat Joe Donnelly.”<sup>14</sup>

3 Other publicly available materials demonstrate that Rokita continued to make statements  
4 about a possible Senate run throughout the spring and summer of 2017. On May 17, 2017,  
5 Rokita posted a photo collage to Facebook with a caption that reads in part:

6 In the last month, as Kathy and I continue to seriously explore the possibility of a  
7 Senate run, we have been traveling all over Indiana seeing old friends, making  
8 new ones, and seeking the advice of Republicans across our great state. And I  
9 have been loving every minute of it! To beat Joe Donnelly in 2018, Republicans  
10 need a candidate who is a conservative, lives here, and has the determination,  
11 fight, and commitment to outwork him. If I challenge Joe Donnelly for Senate,  
12 you can count on me to do just that.<sup>15</sup>  
13

14 On June 30, 2017 — nearly five months after receiving RAD’s instructions to either  
15 disavow his 2018 cycle activity or file a Statement of Candidacy — Rokita filed his Statement of  
16 Candidacy for the 2018 House race.<sup>16</sup> At that point, the Committee had already raised over \$1.3  
17 million in contributions and spent over \$390,000 in connection with the 2018 election. On  
18 July 15, 2017, the Committee filed its July Quarterly Report with the Commission, for receipts  
19 and disbursements through June 30, 2017, again purportedly for Rokita’s 2018 Indiana 4<sup>th</sup>  
20 District House race.<sup>17</sup>

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<sup>14</sup> Compl. at 2 (citing Dan Carden, *Region Republican to Play Key Role in Rokita’s Expected U.S. Senate Bid*, NORTHWEST INDIANA TIMES (May 9, 2017), [http://www.nwitimes.com/news/local/govt-and-politics/elections/region-republican-to-play-key-role-in-rokita-s-expected/article\\_bd6eae03-360b-5ded-98b7-bd9c5e30e607.html](http://www.nwitimes.com/news/local/govt-and-politics/elections/region-republican-to-play-key-role-in-rokita-s-expected/article_bd6eae03-360b-5ded-98b7-bd9c5e30e607.html)).

<sup>15</sup> Todd Rokita (@ToddRokitaIN), Facebook (May 17, 2017, 10:16 AM), <https://www.facebook.com/ToddRokitaIN/photos/a.382317673251.163669.281552298251/10155328365308252/?type=3> (posting to the “Public”).

<sup>16</sup> See Theodore Edward Rokita, Statement of Candidacy (House) (June 30, 2017).

<sup>17</sup> See Hoosiers for Rokita 2017 July Quarterly Report at 1.

1 Rokita continued to make public comments about a Senate campaign after filing his  
2 House Statement of Candidacy. On July 15, 2017, Rokita's verified Facebook account compared  
3 his fundraising for the Senate race with that of another Indiana Representative who was also  
4 expected to enter the race, and the caption read, "Momentum is on our side. Share this with your  
5 friends so they know Todd Rokita is the only potential candidate who can defeat liberal Joe  
6 Donnelly."<sup>18</sup>

7 The following day, a video posted on the Facebook account showed him meeting  
8 potential voters at a July 4th parade. The text accompanying the video read, "Check out this  
9 video of Team Rokita at the 4th of July parades! Everywhere we go, Hoosiers are fired up and  
10 ready to defeat liberal Joe Donnelly!"<sup>19</sup>

11 Almost a month after the July 4th parade post, on August 9, 2017, Rokita announced his  
12 candidacy for the United States Senate.<sup>20</sup> On August 15, 2017, Rokita amended his Statement of  
13 Candidacy to reflect that he had become a candidate for the 2018 Senate election in Indiana and  
14 designated the Committee as the principal campaign committee for his 2018 Senate campaign.<sup>21</sup>  
15 On August 14, 2017, the Committee filed an amended Statement of Organization showing that  
16 the "office sought" had changed to the Senate election.<sup>22</sup> A few days later, the Committee filed a

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<sup>18</sup> Todd Rokita (@ToddRokitaIN), Facebook (July 15, 2017, 12:48 PM), <https://www.facebook.com/ToddRokitaIN/photos/a.382317673251.163669.281552298251/10155527486068252/?type=3> (posting to the "Public").

<sup>19</sup> Todd Rokita (@ToddRokitaIN), Facebook (July 16, 2017, 3:02 PM), <https://www.facebook.com/ToddRokitaIN/posts/10155530879543252> (posting to the "Public").

<sup>20</sup> Resp. at 1.

<sup>21</sup> Theodore Edward Rokita, Statement of Candidacy (Senate) (Aug. 15, 2017).

<sup>22</sup> Hoosiers for Rokita, Statement of Organization (Aug. 14, 2017).

1 Miscellaneous Document informing the Commission that Rokita was no longer seeking election  
2 to the House.<sup>23</sup>

3 On October 13, 2017, the Committee filed its October Quarterly Report disclosing  
4 activity from July 1 to September 30, 2017, a period covering both the purported House and  
5 Senate candidacies. The report was filed with the Secretary of the Senate but indicates on the  
6 first page that it is filed with respect to Indiana's 4<sup>th</sup> District House race.<sup>24</sup> The receipts and  
7 disbursements aggregated in the "Election Cycle-to-Date" summary appear to include amounts  
8 spent and received from before and after August 18 (the date the Committee indicated that  
9 Rokita was no longer raising funds for the House campaign).<sup>25</sup> Despite earlier public statements  
10 about Rokita's fundraising to explore a Senate candidacy, the report does not designate any  
11 receipts or disbursements – either those received or made during the October quarterly reporting  
12 period or those from an earlier reporting period – as made for testing-the-waters activities.

### 13 III. LEGAL ANALYSIS

14 An individual becomes a candidate under the Act if, *inter alia*, such individual receives  
15 contributions or makes expenditures aggregating in excess of \$5,000.<sup>26</sup> Once an individual  
16 meets the \$5,000 threshold, the candidate has fifteen days to designate a principal campaign  
17 committee for that particular campaign by filing a Statement of Candidacy (FEC Form 2) with

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<sup>23</sup> Hoosiers for Rokita, Form 99 Misc. Report (Aug. 18, 2017).

<sup>24</sup> See Hoosiers for Rokita 2017 October Quarterly Report at 1.

<sup>25</sup> Hoosiers for Rokita, Misc. Report (Aug. 18, 2017). As with the October Quarterly Report, the Committee's 2017 Year-End report similarly was filed with the Secretary of the Senate while indicating, on the first page, that it is filed with respect to receipts and disbursements in connection with an election to Indiana's 4<sup>th</sup> District House race. See Hoosier for Rokita 2017 Year-End Report at 1. The 2017 Year-End Report, like the 2017 October Quarterly Report, appears to aggregate in the "Election Cycle-to-Date" summary funds raised for the 2018 Senate election with earlier funds for the purported House candidacy.

<sup>26</sup> 52 U.S.C. § 30101(2); see also 11 C.F.R. § 100.3(a).

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1 the Commission.<sup>27</sup> The principal campaign committee must file a Statement of Organization  
2 within ten days of its designation,<sup>28</sup> and such Statement must disclose, *inter alia*, the name,  
3 address, office sought, and party affiliation of the candidate.<sup>29</sup> The committee must thereafter  
4 file disclosure reports with the Commission in accordance with 52 U.S.C. § 30104(a) and (b).<sup>30</sup>  
5 A candidate must file a new FEC Form 2 for each election cycle in which he or she is a candidate  
6 for the same federal office.<sup>31</sup>

7 Notwithstanding the reporting requirements triggered by an individual's candidacy, the  
8 Commission has established limited "testing the waters" exemptions from the definitions of  
9 "contribution" and "expenditure," which permit an individual to test the feasibility of a campaign  
10 for federal office without becoming a candidate under the Act.<sup>32</sup> These exemptions exclude from  
11 the definition of "contribution" and "expenditure" those funds received and payments made  
12 solely to determine whether an individual should become a candidate.<sup>33</sup> These regulations seek  
13 to draw a distinction between, on the one hand, activities directed to an evaluation of the

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<sup>27</sup> 52 U.S.C. § 30102(e)(1); 11 C.F.R. § 101.1(a).

<sup>28</sup> 52 U.S.C. § 30103(a); 11 C.F.R. § 102.1(a).

<sup>29</sup> 52 U.S.C. § 30103(b)(5); 11 C.F.R. § 102.2(a)(1)(v).

<sup>30</sup> See, e.g., Factual and Legal Analysis at 5, MUR 6449 (Jon Bruning); Factual and Legal Analysis at 2, MUR 5363 (Alfred C. Sharpton).

<sup>31</sup> See 11 C.F.R. §§ 101.1, 100.3(b); Factual and Legal Analysis at 3, MUR 6561 (Friends of Liberty for Jessica).

<sup>32</sup> See 11 C.F.R. §§ 100.72 and 100.131; Factual and Legal Analysis at 7, MUR 6775 (Hillary Clinton); Factual and Legal Analysis at 8, MUR 6776 (Niger Innis); Factual and Legal Analysis at 6, MUR 6735 (Joseph A. Sestak); see also Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) (noting that the "testing the waters" regulations "are intended to be limited exemptions from the reporting requirements of the Act").

<sup>33</sup> 11 C.F.R. §§ 100.72(a); 100.131(a).

1 feasibility of one's candidacy and, on the other, conduct signifying that a decision to become a  
2 candidate has been made.<sup>34</sup>

3 An individual who is testing the waters need not register or file disclosure reports with  
4 the Commission unless and until the individual subsequently decides to run for federal office or  
5 conducts activities that indicate he or she has decided to become a candidate.<sup>35</sup> All funds raised  
6 and spent for testing-the-waters activities are, however, subject to the Act's limitations and  
7 prohibitions.<sup>36</sup> Commission regulations require that once the individual begins to campaign or  
8 decides to become a candidate, funds received and disbursed for testing-the-waters activities are  
9 subject to the reporting requirements of the Act, and must be reported with the first report filed  
10 by the candidate's principal campaign committee.<sup>37</sup>

11 Further, Commission regulations provide that an individual seeking more than one  
12 federal office, or a federal office and a state office, must designate separate principal campaign  
13 committees and maintain completely separate campaign organizations.<sup>38</sup> No funds, goods or  
14 services may be transferred between or used by the separate campaigns.<sup>39</sup> If an individual

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<sup>34</sup> See Advisory Op. 1981-32 (Askew).

<sup>35</sup> *Id.*; see also Advisory Op. 1979-26 (Grassley).

<sup>36</sup> 11 C.F.R. §§ 100.72(a); 100.131(a).

<sup>37</sup> *Id.* Commission regulations further require that an individual testing the waters keep records of the name of each contributor, the date of receipt and amount of all funds received, and all payments made in connection with activities conducted under 11 C.F.R. §§ 100.72 and 100.131. *Id.* § 101.3.

<sup>38</sup> 11 C.F.R. § 110.8(d); Advisory Op. 1995-3 (Gramm) ("Commission regulations provide that a candidate seeking more than one Federal office must designate separate principal campaign committees and establish completely separate campaign organizations.") (superseded in part on other grounds); *Campaign Guide for Congressional Candidates and Committees* at 59-60 (June 2014), (presenting example of "Candidate B," who "begins the 2014 election cycle as a House candidate, but later begins a campaign for a Senate seat in 2014"); see also 52 U.S.C. 30102(e)(3) (prohibiting an authorized committee from supporting more than one candidate); 11 C.F.R. § 101.1(a) (requiring a candidate to include, *inter alia*, his or her name and address, party affiliation, and office sought when designating a principal campaign committee).

<sup>39</sup> 11 C.F.R. § 110.8(d)(2); see 52 U.S.C. § 30116(a)(5)(C); 11 C.F.R. § 110.3(c)(5), (7).

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1 wishes to contribute to both campaigns, the contributions for each election for each office must  
2 be made to separate committees.<sup>40</sup>

3 Although these rules do not expressly reference funds received for the purpose of testing  
4 the waters, the Commission has extended their application to such funds in two advisory  
5 opinions. In Advisory Opinion 1982-19 (Cranston Presidential Advisory Committee) ("AO  
6 1982-19"), the Commission recognized that an individual may test the waters for a potential  
7 candidacy to one federal office while also a candidate for another federal office.<sup>41</sup> But the  
8 Commission determined that if an individual sought to make contributions to both the  
9 candidate's authorized campaign committee and his exploratory committee, the following  
10 requirements at section 110.1(f) must be met: (1) "the contributor designates in writing for  
11 which each office is intended"; (2) "the candidate maintains separate campaign organizations  
12 (including separate committees and separate accounts)"; (3) "no funds are transferred, loaned or  
13 otherwise contributed between or among the separate campaigns and no expenditures are made  
14 by one campaign on behalf of the other."<sup>42</sup>

15 Likewise, in Advisory Opinion 1994-37 (Schumer) ("AO 1994-37"), the Commission  
16 determined that section 110.8(d)'s requirement that federal candidates maintain separate  
17 campaign organizations when running for more than one office applies to a candidate's testing  
18 the waters for another candidacy. The Commission noted:

19 Although a testing the waters effort is not technically a candidacy as defined for  
20 Federal purposes . . . , the exploratory efforts by Mr. Schumer for a gubernatorial

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<sup>40</sup> 11 C.F.R. § 110.1(f). Each contribution must be designated in writing by the contributor for a particular office, and a committee generally may not transfer funds to, loan funds to, make contributions to, or make expenditures on behalf of the candidate's other committee.

<sup>41</sup> AO 1982-19 at 1.

<sup>42</sup> *Id.* at 4-5 (citing 11 C.F.R. § 110.1(f)).

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1           candidacy would constitute a campaign necessitating a separate organization from  
2           that of his House candidacy. In addition, the exploratory effort may very well  
3           develop into a candidacy.<sup>43</sup>

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5 Thus, although the Commission has not squarely addressed this issue in an enforcement  
6 matter where a candidate actually used a single committee to raise and spend funds in  
7 connection with both a declared candidacy for one federal office and a testing the-waters  
8 effort for another office, the Commission has advised that federal candidates who have  
9 already designated an authorized committee for one candidacy should establish a separate  
10 account if they are testing the waters for another potential candidacy.

11           Respondents contend, without citing any support, that the Commission's testing-the-  
12 waters regulations should not apply to Rokita at all, arguing that they govern only those  
13 individuals who have not yet decided to become a candidate for *any* office.<sup>44</sup> Respondents'  
14 argument lacks merit as the testing-the-waters regulations do not specify that they apply only to  
15 first-time candidates, and as reflected in the advisory opinions above, the Commission has  
16 applied those regulations to officeholders seeking re-election.<sup>45</sup>

17           **A. There is Reason to Believe that Rokita Failed to Timely File a Statement of**  
18           **Candidacy for His 2018 House Campaign**

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20           As noted above, a candidate must file a new Statement of Candidacy for each cycle in  
21 which he or she is a candidate, within fifteen days of crossing the \$5,000 threshold.<sup>46</sup> The

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<sup>43</sup> AO 1994-37 at n.3 (Schumer) (advising on the required separation and allocation of costs between a principal campaign committee for the candidate's Congressional re-election campaign and an exploratory committee for a potential gubernatorial campaign).

<sup>44</sup> Resp. at 1-2. The Response does not address RAD's Disavowal Letter or Rokita's untimely Statement of Candidacy for the House campaign in making this argument.

<sup>45</sup> See AO 1994-37; 1982-19.

<sup>46</sup> See 11 C.F.R. §§ 101.1(a); 100.3(a)(1), (2).

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1 Committee reported making over \$5,000 in disbursements for the 2018 election by  
2 November 30, 2016, and there is nothing to suggest that Rokita was merely testing the waters for  
3 his House re-election campaign. Thus, he became a candidate on November 30, 2016, and  
4 should have filed his Statement of Candidacy by December 15, 2016.<sup>47</sup>

5 Rokita did not file a Statement of Candidacy for the House race until June 30, 2017,  
6 which was 197 days late. The Response does not address why Rokita failed to file his Statement  
7 of Candidacy for his House candidacy until that date, and it does not contend that Rokita was  
8 testing the waters for that campaign. Accordingly, we recommend that the Commission find  
9 reason to believe that Rokita violated 52 U.S.C. § 30102(e)(1) by failing to timely file his  
10 Statement of Candidacy for his 2018 House campaign.

11 **B. There is Reason to Believe that the Committee Did Not Properly Report**  
12 **Receipts and Disbursements of Funds for Rokita's Senate and House**  
13 **Campaigns**

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15 Based on the guidance provided in AO 1982-19 and AO 1994-37, Rokita should have  
16 established a separate organization for the purposes of receiving, spending, and reporting funds  
17 in connection with his testing-the-waters activities for his Senate campaign to comply with  
18 sections 110.1(f) and 110.8(d) of Commission regulations. Because he failed to do so, the  
19 Committee's reports inaccurately reflect that all of the activity from at least February 2017  
20 through August 14, 2017 was in connection with the House campaign when the public record  
21 indicates that Rokita was likely raising and spending substantial sums to test the waters for the  
22 Senate campaign. Further, once Rokita became a registered Senate candidate, all of the funds

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<sup>47</sup> Alternatively, an individual is considered a candidate when he or she fails to respond within 30 days to a written disavowal notice that another person has raised or spent \$5,000 on the individual's behalf. 11 C.F.R. § 100.3(a)(3). Rokita would have triggered candidacy by failing to disavow his authorized committee's activity within 30 days of receiving RAD's notification on February 6, 2017, but he had already crossed the spending threshold by that point.



1 fact, these reports all purport to reflect activity for only Rokita's House campaign rather than his  
2 potential (or actual) Senate campaign.<sup>51</sup>

3 Nevertheless, as described above, the record indicates that many receipts and  
4 disbursements were actually in connection with Rokita's Senate candidacy. In April 2017,  
5 Rokita personally made statements that his fundraising would affect when he would announce  
6 his Senate candidacy.<sup>52</sup> And the Response does not deny that Rokita raised or spent funds in  
7 connection with testing the waters for his Senate campaign by stating "[a]ny funds that  
8 Representative Rokita raised or spent during the period when he was considering whether to  
9 become a candidate for the U.S. Senate were timely reported by Hoosiers for Rokita."<sup>53</sup> Yet,  
10 that activity was not *accurately* reported because it was not disclosed in connection with Rokita's  
11 Senate race. Instead, the Committee's reports appear to disclose a large amount of fundraising  
12 and spending entirely on behalf of Rokita's House re-election campaign.

13 Accordingly, we recommend that the Commission find reason to believe that Rokita  
14 violated 11 C.F.R. § 110.8(d) by failing to establish and maintain separate campaign committees  
15 for each of his candidacies,<sup>54</sup> and that the Committee violated 52 U.S.C. § 30104(b) and

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<sup>51</sup> The Committee's 2017 April Quarterly, July Quarterly, and October Quarterly reports all indicate that they are being filed with respect to Indiana's 4th District House race with the designation "IN 04" on the first page. We note however, the Committee never changed this designation in subsequent disclosure reports after Rokita filed his Statement of Candidacy for the Senate race in August 2017 until the Committee filed its 2018 Pre-Primary Report on April 30, 2018. In that Pre-Primary Report, the Committee includes the correct designation "IN 00" to reflect that the Report is being filed in connection with the Senate race.

<sup>52</sup> See *supra* p. 5.

<sup>53</sup> Resp. at 2.

<sup>54</sup> We do not make a recommendation as to 11 C.F.R. § 110.1(f) given that this regulation sets forth requirements directed at the donor when making contributions, not to the committee receiving the contributions.



1 2017, as evidence that Rokita's had already decided to run for Senate.<sup>58</sup> Rokita's hiring of a  
2 fundraising consultant and even eventually raising over \$1 million are not activities that are  
3 inconsistent with testing-the-waters activities, as reflected in previous Commission matters.<sup>59</sup>

4       Given the lack of information indicating that Rokita had clearly decided to become a  
5 Senate candidate before August 2017, we recommend that the Commission find no reason to  
6 believe that Rokita violated 52 U.S.C. § 30102(e) by failing to timely file his Statement of  
7 Candidacy for his Senate campaign.

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<sup>58</sup> Compl. at 2.

<sup>59</sup> See, e.g., MUR 6224 (Fiorina) (the Commission found no reason to believe where a U.S. Senate candidate committee raised in excess of \$600,000 and spent over \$300,000 during the testing the waters phase); MUR 5934 (Thompson) (the Commission found no reason to believe where presidential candidate committee raised \$9.52 million and spent only \$2.9 million before formal candidate announcement); see also Resp. at 5.

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**V. RECOMMENDATIONS**

1. Find reason to believe that Theodore "Todd" Rokita violated 52 U.S.C. § 30102(e)(1) by failing to timely file his Statement of Candidacy for his 2018 House campaign.
2. Find reason to believe that Hoosiers for Rokita and Michael J. Erler Sr. in his official capacity as treasurer violated 52 U.S.C. § 30104(b) and 11 C.F.R. §§ 100.72(a), 100.131(a).
3. Find reason to believe that Theodore "Todd" Rokita violated 11 C.F.R. § 110.8(d) by failing to designate separate campaign organizations for his House and Senate campaigns.
4. Find no reason to believe that Theodore "Todd" Rokita violated 52 U.S.C. § 30102(e)(1) by failing to timely file his Statement of Candidacy for his 2018 Senate campaign.
5. Approve the attached Factual and Legal Analysis.
6. Authorize pre-probable cause conciliation with Theodore "Todd" Rokita, Hoosiers for Indiana, and Michael J. Erler Sr. in his official capacity as treasurer prior to a finding of probable cause.
7. Approve the attached conciliation agreement.
8. Approve the appropriate letters.



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# LOOKING AHEAD TO THE 2018 SENATE RACE

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## Looking Ahead to the 2018 Senate Race

05 FEBRUARY NEWS

## Indiana's U.S. Senate Race Quickly Heats Up

INDIANAPOLIS – The politicians of Indiana have quickly turned their attention to the 2018 midterm elections, specifically Indiana's U.S. Senate race.

In an interview with FOX 59 Tuesday, Rep. Luke Messer (R-Ind.) said he hasn't ruled out a bid in an attempt for Republicans to unseat Democratic Sen. Joe Donnelly.

"I've certainly been encouraged by many to take a hard look at running for the U.S. Senate," Messer said. "It's a process we're taking very seriously as a family, but we're not ready for any announcements today. Right now we're focused on the first 100 days of this new presidency and this new Congressional team."

Also Tuesday, Rep. Todd Rokita (R-Ind.) left the door open for a potential run.

"Sen. Donnelly needs to quickly decide if he is going to work with President Trump and Republicans to get the country back on track, or if he is going to continue obstructing efforts to make America great again," Rokita said in a statement to FOX 59. "If he decides to stand with Chuck Schumer and Washington liberals against Hoosiers, we will be able to choose a new conservative senator in 2018, and I will continue to evaluate the best role for me in that effort."

On Wednesday Kokomo attorney Mark Hurt is set to begin a statewide series of kickoff events in Indianapolis, officially announcing his bid. Hurt has previously worked in Washington



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Donnelly has hired Peter Hanscom as campaign manager for his re-election bid.

"I am running for re-election in 2018 so I can continue working non-stop on behalf of Indiana families," Donnelly said in a statement announcing Hanscom's hire earlier this month.

Donnelly is already the target of a number of conservative groups including the Judicial Crisis Network, which announced earlier this month it would target "vulnerable senators up for re-election in 2018 like Joe Donnelly and Claire McCaskill."

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